No. 9277

United States Circuit Court of Appeals

For the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA,
a Corporation,
Appellant,
vs.
JAMES RALPH HUNT,
Appellee.

Brief of Appellee

Appeal from the District Court of the United States for the District of Oregon.

JAMES ARTHUR POWERS,
Attorney for Appellant.

GEO. L. RAUCH,
Attorney for Appellee.

SUBJECT INDEX

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FURTHER STATEMENT of the CASE

Defendant rejected by positive act the Workman's Compensetion Law of the State of Oregon, which rejection became effective on July 1, 1934, and continued at and long past the time of the accident complained of, or November 5, 1934, to at least October 3, 1938, or the time of filing Defendant's Amended Answer to Second Amended Complaint. Please see Paragraph VII (T. 8) Second Amended Complaint

and Paragraph II (T. 10) Amended Answer admitting the same.

Defendant's business during this time was that of conducting and controlling a workshop where power driven machinery was used and manual labor was exercised for gain in the repairing and adapting of articles and parts of articles and machines, namely: automobiles and the tires thereof where Plaintiff worked.

These facts were admitted or assumed throughout the entire transcript but are especially shown by Defendant's Exhibits 2, 3, 4 and 5, which are photographs of the workshop or filling station showing the electric motor and air compressor and the hydraulic hoist and pumps driven by their power and showing the workmen repairing or adapting an automobile tire, pictures omitted by mistake from the Transcript of Record herein (T. 149) but by order correctly included in the Supplemental Transcript herein.

Which Supplemental Transcript also contains that portion of the testimony of Ernest H. Coats omitted from the Transcript by error.

(Supplemental Transcript 1 and 2)

Q. Now, do you know what equipment with

which the station at Fargo and Union was furnished during that period between the middle of June, 1934, and the 5th of November, 1934?

A. Equipment, sir?

Q. Yes. Do you know with what equipment it was furnished during that period of time, the station?

A. I know that it had the regular service station equipment, a hoist, air compressor, pumps, and of course air lines and anything that goes with the compressors, tools, tire tools.

Q. Do you know what air pressure was carried?

A. 180, sir.

Q. How is that?

A. 180 pounds.

Q. 180 pounds. Do you know for what it was used?

A. It was used, for one thing, to lift the hoist, to force the oil into the cylinders to lift the hoist; it was used for pumping up tires, and so on and so forth.

Q. Do you know anything about what made

the compressed air? What kind of machinery was used?

A. It was an electric motor run by 220 volt of electricity.

Q. 220 volt current?

A. Yes.

Q. And motor?

A. And motor, yes.

Q. And what did the motor run, in turn?

A. The motor run the machinery that compressed the air.

Q. And how was this air brought to the hoist to push the oil up into it like you said?

A. It was piped from the service building, from the front office back to where the air compressor was back to the hoist with small pipes.

Q. I will ask you what if any machinery did you service as a business at that location?

A. We serviced trucks, many trucks, many truck tires, and ——

Q. Did you service only trucks?

A. Passenger cars.

Q. Trucks and passenger cars?

Defendant (T. 153-160) introduced as its (Exhibit No. 26) a policy of indemnity against employer's liability in which the assured was the Union Service Stations, Inc. This company, though named as a defendant in the complaint, ceased to be a party in this cause long before its submission to the jury. This policy was numbered US519380 and expired July 1st, 1934, the day Plaintiff ceased to work for Union Service Stations, Inc. The accident for which Plaintiff's judgment herein was rendered, did not occur until November 5th, 1934, upon which later date Plaintiff was working for Defendant, Union Oil Company of California.

Defendant at (T. 160) also introduced as Exhibit 27 a policy in which it is the assured and which is identical in form with its Exhibit 26 above. This policy was numbered 543014.

The only evidence of any payments to Plaintiff by Defendant on account of the accident here involved, of November 5, 1934, are Defendant's Exhibits 10 and 11 and refer to another or third policy in which Defendant is the assured and which is numbered 543012. This policy 543012 was never introduced nor offered

in this case nor any of its terms or conditions in any way made known or proven (T. 151-153), although ample opportunity was given Defendant to explain twice when Learned Counsel for Defendant gave the insurance adjuster, Mr. Hadfield, a direct suggestion to do so.

(T. 136.)

"Mr. Powers: Q. Do you have the original policies with you?

A. I have two of them here." (Interruption.)

"Q. Mr. Hadfield, I was asking you about the drafts, and I notice one bears the number 543012, and one bears the number of 519380, giving policy numbers. How is it that there were two different policy numbers there on the drafts?

A. Well, that would come on the expiration of one policy and another one started. These policies run for a year at a time."

(T. 138.)

"Q. Now, I see that there are two different policy numbers referred to on the the drafts. That is, one draft here of March the 11th, 1935, bears policy numbers 543012. Can you tell me which policy that ——" (Interruption.)

No explanation was made by the insurance man at

either of these opportunities to show why policy No. 543012 or its terms were not introduced in evidence.

And then after Plaintiff testified as follows:

(T. 144 to 145)

"Q. Now, I am referring to the letters which I introduced which stated that you were being paid for your second accident of November 5th, 1934, and ask you if you ever received anything or any draft at any time relating to the second policy which you hold in your hand?

A. No, I didn't.

Mr. Powers: What is the number of that policy?

Mr. Rauch: Q. What is the number you hold?

A. 543014.

Q. Did you get something for loss of time on account of your second injury?

A. Yes, I did.

Q. Now, why do you say that you never received anything on account of the second injury in any way relating to or with respect to the second policy? And before you answer I am handing you Defendant's Exhibit 10 and Defendant's Exhibit 11, which are drafts that re-

fer to the accident of November 5th, 1934, and ask you why you say you never received anything under the second insurance policy?

A. I say that because the numbers on the checks refer to different policies.

Q. That money that you received then does not refer to this second policy at all?

A. No, sir."

One of these payments under policy numbered 543012 Exhibit 11 was changed from compensation for a segment of time lost because of the accident in question to be for another accident of June 11, 1934, a date upon which Plaintiff was not working for Defendant (T. 152).

Other drafts, Defendant's Exhibits 12, 14, 15, 16, 17, 18 and 19, made to Plaintiff were for short segments of time lost because of the accident of June 11, 1934, with the Union Service Stations, Inc., a stranger to the judgment herein, the then employer of Plaintiff, the assured, and under its policy numbered 519-380, which policy in no way affected the relations between Plaintiff and Defendant and which expired before the latter began. (T. 152-153)

(T. 114 to 115)

"A Juror: Is there any significance to that?

Mr. Powers: No.

The Juror: Oh. That is all right, then.

The Court: Let me see the checks.

(The checks were handed to the Court.)

Mr. Powers: Now, these checks—

The Court: Mr. Powers, just a minute.

Mr. Powers: Yes."

(T. 116 to 117)

"The Court: I think I want to make some statement to the jury about them. Just so we keep these dates straight, gentlemen of the jury, the plaintiff now has fixed the time of the accident for which he is suing as November 5th, 1934. He testified that he hurt his back earlier in the year, in June, 1934. He went to the hospital in—

Mr. Powers: February 28th, '35.

The Court: In 1935. These checks run through '34 and '35, and later in the case after it is all in there may be some questions for your determination as to the place in the case of all of the dates, including the dates on the drafts.

(Mr. Powers thereupon explained Defendant's Exhibits 9 to 21, inclusive, further to the jury.)

The Court: I want to make this further statement to the jury, Mr. Powers.

Mr. Powers: Yes, your Honor.

The Court: That insurance policy insured the company for which the plaintiff worked up to July, 1934.

Mr. Powers: July 1st, 1934, yes, your Honor.

The Court: Yes. When he was first injured, which is not the injury he is suing on here, in June of '34, he was working for the company that that policy insured, and that company is not now in the case; and that insurance ran out by its terms, did it not, Mr. Powers?

Mr. Powers: Yes, your Honor.

The Court: At the end of June, 1934?

Mr. Powers: That is correct.

The Court: That insurance was not in force at the time when he claimed he was injured later in November, the case for which he is suing here, and that insurance did not insure the employer for whom he was working in November, '35, when he claims he was injured, the injury which he claims he suffered for which he is suing here. All those things will have their place at the time of the instructions and will be dealt with by the lawyers in their arguments.

(T. 134 to 136)

"The Court: Well, now I will tell you, Mr.

Rauch. I am not going to pin myself down to the particular dates that are written on these drafts, and I would be willing to sit here and listen to you for a long while gladly if I really thought that you were surprised by this and that your case was affected by it, but I don't see that, and it may be necessary to amend the pre-trial order, I am not sure of that. I will look up the rule pretty soon, but if we were just trying this case, Mr. Rauch, without the pre-trial in the old fashioned way, and a man came in here with two policies instead of one, we would just treat that as a routine development on the other side, and I don't see that you have been kept from any preparation you could have made. You still have your rebuttal.

Mr. Rauch: Well, if your Honor views it that way I will withdraw my objection.

The Court: I am going to tell the jury at the end, if the case goes to the jury, unless Mr. Powers can persuade me as a matter of law that this is a release, and that is not my feeling just now, I am just going to give this to them as to whether there was a meeting of the minds on a settlement, if it goes to the jury. That is my present feeling, that the situation is part in parol and part in writing, but I shall leave it all to the jury to pass on that question. And so I will admit that policy.

(The policies of insurance so offered and received in evidence were marked Defendant's Exhibits 26 and 27, respectively.)

(T. 141 to 142)

Mr. Rauch: I still object, your Honor.

The Court: Now, gentlemen, maybe I am the only one here that understands about the policy business, or maybe I am the only one that misunderstands. You can correct me if I am wrong. I understand that this man worked for the Union Service Stations until July. He had his first injury in June while he was working for those people.

Mr. Powers: Yes, your Honor.

The Court: During that period Union Service Stations had one of these policies.

Mr. Powers: That is correct.

The Court: Which ran out at the end of June. He began to work in July for the Union Oil Company and during that employment and in November he was hurt, so he says, the second time, which aggravated his prior injury for which he is suing here now, and during that period Union Oil Company had a policy of the same kind and with the same company.

Mr. Powers: That is correct.

The Court: And you claim that these drafts

were paid under both of those policies, some under one policy and some under another policy.

Mr. Powers: That is correct, your Honor.

The Court: And that is all there is to that now, isn't it?

Mr. Powers: Except that there was some reason why, when they first started paying under the second policy, the Union Oil Company policy, to show why they went back and started charging it up to the first policy again, the operation and the claim from November 5th."

Defendant at all times including the trial denied that Plaintiff had been injured by a falling car and maintained that his condition was a recurrence of his former injury of June 11, 1934 (T. 132 and 133), though they made one payment on account of a segment of time lost because of the accident of November 5, 1934, but under the unknown policy numbered 543012 (T. 151), but immediately reverted to their contention that the injury of the later date was a recurrence of the injury of June 11, 1934, while he was working for the Union Service Stations, Inc. (T. 142 and 163). This confusion in Defendant's mind also appears from the reference on page 10 of its brief referring to its declaration that the operation was to cure a congenital and chronic condition while on page

5 of its brief it states "car slipped off the jack and struck his back in the region of his sprain" as it does at (T. 106) "and plaintiff informed the claims adjuster of his second accident of November 5, 1934, telling him that a car had slipped off a jack striking him on the back," though Defendant's witness, the claims adjuster, Mr. Hadfield, testified: (T. 133)

> "Mr. Powers: Q. And did he tell you that any car had fallen on him at any time?
>
> A. No, sir."

The resulting confusion in Plaintiff's mind is shown by his testimony.

> (T. 145 to 146)
>
> "Mr. Rauch: Q. When you received those checks marked for the accident of November 5th, 1934, what did you understand you were receiving?
>
> A. I understood I was receiving my time for the accident that happened to me. It was just payment or compensation for time lost.
>
> Q. Lost on account of what?
>
> A. Well, the first injury, and I saw the dates on there and I though possible there was a mistake, to the second accident and the aggravation of the first injury."

Defendant or his dependents at no time signed any general release or release of any kind except the endorsements on the drafts which were a receipt in the case of each check for the "account stated on the other side" which was a separate account in each draft for compensation for just the exact time lost between the dates therein named as therein computed. (T. 151 and 152.) If the unknown terms of policy 543012 under which the payments were made for the accident of November 5, 1934, or Defendant's Exhibits 10 and 11 (T. 152) were the same as those of policies numbered 519380 and 543014 or Defendant's Exhibits 26 and 27, then it contained the provisions:

(T. 158)

> "If such injured employee or his dependents accept the first payment on account of compensation, he or they shall at that time execute a general release relieving this Employer and the Company from all further obligation for compensation in manner and form as agreed."

However, there is nothing in this case to show what were the provisions of policy 543012.

That agreement of settlement and accord ever existed, with respect to the accident of November 5, 1934, by parole is repeatedly, consistently and absolutely denied by Plaintiff.

(T. 113 to 114)

"Q. And you had a choice then of going on and taking those compensation payments and having the bills paid for you or else suing the Union Oil Company, isn't that so? You could do one or the other?

A. Well, I imagine so. At the time I was interested in getting well.

Q. Yes, and you thought it was better to take these compensation payments and have your bills paid than to go into a lawsuit with them?

A. I didn't think anything about that.

Q. Well, that was the proposition, wasn't it, whether you would take the compensation payments and the—

A. There was nothing—well, they told me that they would pay my salary in the form of compensation, yes.

Q. Well, wasn't that your understanding?

A. They didn't mention anything about a lawsuit, and I didn't either.

Q. Well, wasn't it understood there that these payments would be made under that policy to you in lieu of any claim that you would have?

A. No, sir, I was never asked about that.

Q. Did you understand that they were paying you there and paying these bills and that you could still sue them for this same injury?

A. I didn't under — there was nothing said about that. They said they would pay me compensation and there was nothing said about suing anything, and I didn't understand one way or the other."

(T. 143)

"Q. Now, at the time, whether by the signing of the check or in any manner, did you ever agree with any person to waive your right to claim for injuries to yourself, your body, your person, on account of the accident of November 5th?

A. No, I didn't."

(T. 144)

"Q. Did you ever agree to accept anything under that policy in consideration of the settlement of your claims against the Union Oil Company?

A. No, sir."

(T. 146)

"Q. Did you ever accept any money at any time from this defendant or its insurance company for any other claim than this compensation, for any other claim or for any other reason or

thing for this compensation which you state is for time lost due to the operation, the first accident, aggravation of that, and the second accident?

A. No, sir."

There is no contradiction by any of Defendant's witnesses of Plaintiff's strong testimony last above, nor any claim by them that a general release or waiver of his right to sue for his injuries was ever had from Plaintiff either by writing or parol.

Defendant emphasizes by italics in its Brief at page 7 a statement that Plaintiff inquired concerning what the insurance company would do, but when the evidence in question and answer form is examined it is easily seen that the inquiry was only an accompaniment of Defendant's manager, Mr. Russell, and limited entirely to the matter of partial compensation for time loss because of what Mr. Hadfield, the adjuster, decided was a recurrence of the injury of June 11, 1934, after Defendant had compensated Plaintiff in full for his time for the same accident from June 11, 1934, to February 28, 1935, although Plaintiff had fully informed them of the fall of the car upon him on November 5, 1934.

(T. 70)

"A. I was wearing the brace at all times and

I would go out and get credit card applications and I would run errands and help him around the office, and during this time I was on full time payments.

"Mr. Russell says, 'We don't want to report this as loss time accident' "—

(T. 71)

"Q. Yes, and how long did you continue that?

A. Well, I continued that from shortly after I was hurt up until the 28th day of February, 1935.

Q. What happened then?

A. On the 28th day of February, 1935, I received instructions that I was to go to the hospital for an operation, which I did, and on the 1st day of March, 1935, they operated on me."

(T. 109)

"Cross examination:

Q. Then you got your wages right through from July 1st, 1934, or for that matter, in June also of 1934, the time the first accident occurred, you got your wages right through up to the time you went into the hospital?

A. Yes, sir.

Q. Then when you went into the hospital for the operation you got compensation payments?

A. That is right."

(T. 111)

"Q. Did you know that you were going to receive compensation payments when you were in the hospital?

A. Yes, sir.

Q. How did you know that?

A. Well, Mr. Russell told me that when I went to the hospital that I would go off of full salary."

(T. 112)

"A. The day before the operation Mr. Russell and I went down and talked to Mr. Hadfield and he asked me how much I was making a month, and he told me the percentage I would be paid every two weeks on my salary."

(T. 129)

"A. Mr. Russell explained to Mr. Hadfield that it was necessary for me to have an operation, and when I got down there he asked me about my back, and what had happened, and I told him just what had happened, and all he did was to tell me what percentage I would get of my salary. He asked me approximately how much I was making a month."

(T. 67)

"A. And I talked to Mr. Russell and explained to him just what had happened to me, that I had jacked this car up and it had fallen down and struck me across the hips."

(T. 106.) It is stipulated at line 8: "and plaintiff informed the claims adjuster of his second accident of November 5, 1934, telling him that a car had slipped off a jack striking him on the back." It should be remembered that all the payments to Plaintiff, except one, were for the accident of June 11, 1934.

There was no attempt at a settlement for pain and mental suffering, before, during or after the operation and the bodily impairment resulting, and at that time neither of the parties knew what a fusion operation was, and no further conference was had.

(T. 133)

"A. Mr. Hunt and Mr. Russell came over to the office and said that Dr. Dillehunt had recommended this fusion operation, and I didn't know what it was myself. I hadn't had any experience with it before, and so I asked him just what the operation meant. He informed me of what they would have to do to the joints there, and so I asked him at that time how that happened. He stated that he had sprained his back as the result

of changing a tire, and I told him we had had a report of an accident in June of the same thing and he said yes, it was a recurrence of the first injury."

(T. 110 to 111)

"A. Well, Dr. Dillehunt told me that it was a very—that it was a tough operation, he told me that, and he didn't say how they would perform it or how they would do it, he just told me it would be a bad operation and he told me that I would probably be in the hospital for three or four months. Outside of that, that is about all that was said. I couldn't find anyone else that had ever had a spinal fusion."

(T. 121)

"A. No, I never talked to the Hartford people after I got out of the hospital."

That Plaintiff had actual injuries and damages for pain and injury immediately after the fall of the car upon him, the Transcript of Record shows at (T. 61 to 66); his suffering and confinement at home and when he returned to Defendant's office at (T. 67 to 72); his experience and suffering including mental anguish at (T. 73 to 79); the hardship of his convalescence at home at (T. 80); the permanent impairment of his body and the constant continuing pain

and the handicap to his earning power at (T. 81 to 85). Witness Everett L. Keith describes Plaintiff's condition immediately after the accident at (T. 91).

SUMMARY

(a) Defendant at the time of the accident or November 5, 1934, was engaged in a hazardous occupation and had rejected the Workman's Compensation Law of Oregon, and such rejection was then in effect, and that it was no defense for it to show;

That any negligence of Plaintiff, other than his willful act, committed for the purpose of sustaining the injury complained of, contributed to the said accident, or

That Plaintiff had knowledge of the danger or assumed the risk which resulted in his said injury.

(b) All the writings introduced in this case failed to show any contract or terms under which anything was paid to Plaintiff or accepted by him, on account of the accident complained of which occurred November 5, 1934.

(c) That no insurance policy was introduced in this case under the provisions of which Plaintiff ever received anything for his injury of November 5, 1934.

(d) All of the parol evidence introduced in this case failed to show any contract or terms under which anything was paid to Plaintiff or accepted by him on account of the accident of November 5, 1934, for his pain and suffering in general and the permanent consequences of his impaired earning power and use of his body and his continued and future pain and suffering or any of them.

(e) That from all the evidence in this case, written and parol, the jury was justified in finding that Plaintiff considered and understood that the payments which were made to him were for compensation for time lost and for medical and surgical care and for neither of which was he suing in this case.

AN EMPLOYER IN OREGON ENGAGED IN A HAZARDOUS OCCUPATION WHO REJECTS THE WORKMEN'S COMPENSATION LAW IS DEPRIVED OF THE COMMON LAW DEFENSES, INCLUDING CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF THE RISK.

1935 Oregon Code Supplement, Sec. 49-1815; Oregon Laws 1935, ch. 32, par. 1, p. 41:

"HAZARDOUS OCCUPATIONS.

If an employer is engaged in any of the occupations defined by this act as hazardous, the

workmen employed by him in such occupations are deemed to be employed in a hazardous occupation, but not otherwise. The hazardous occupations to which this act is applicable are as follows:

(a) When power-driven machinery is used, the operation of printing, electrotyping, engraving, photoengraving, lithographing or stereotyping plants, laundries, irrigation works, grain warehouses, factories, mills or workshops;"

1935 Oregon Code Supplement, Sec. 49-1817; Oregon Laws 1935, ch. 50, par. 1, p. 68:

"DEFINITIONS.

When used in this act words shall mean as follows:

'Workshop' means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of any article, machine or thing, over which plant, yard, premises, room or place the employer of the person working therein has control.

'Mill' means any plant, premises, room or place

where machinery is used for any process of manufacturing, changing, altering or repairing any article or commodity for sale or otherwise, together with the yards and premises which are part of the plant, including elevators, warehouses and bunkers."

1935 Oregon Code Supplement, Sec. 49-1819; Oregon Laws 1935, ch. 25, par. 1, p. 28:

"ELECTIVE PRIVILEGE OF EMPLOYER—COMMON-LAW DEFENSES ABROGATED.

Before becoming engaged as an employer in any hazardous occupation defined by this act, such employer may file with the commission a statement in writing declaring his election not to contribute to the industrial accident fund, and thereupon shall be relieved from all obligations to contribute thereto. Such employer shall be entitled to none of the benefits of this act, and shall be liable for injuries to or death of his workmen, which shall be occasioned by his negligence, default or wrongful act as if this act had not been passed. In any action brought against such an employer on account of an injury sustained by his workmen, it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman, that

the negligence of the injured workman, other than his wilful act, committed for the purpose of sustaining the injury, contributed to the accident, or that the injured workman had knowledge of the danger or assumed the risk which resulted in his injury."

Hollopeter v. Palm, 134 Or. 546 (291 P. 380, 294 P. 1056).

ARGUMENT

With the admissions that the Workmen's Compensation Law had been rejected, which rejection was still in effect at the time of the accident (T. 8 and 10), and Defendant's Exhibits 2, 3, 4 and 5, and the testimony of Ernest H. Coats, Supplemental Transcript, 1 and 2, and the entire testimony of the case showing that Defendant was running a workshop, yard or place where power-driven machinery was employed and manual labor was exercised by way of trade for gain or otherwise in or incidental to the process of repairing or adapting for sale or otherwise, articles or parts of articles, namely, automobile and automobile tires, at the said time complained of, November 5, 1934, and that at such time Defendant had control of such workshop, yard or place, no words of the writer can make more plain the application of the law above

printed. No breath of suggestion has been made that Plaintiff's acts were wilful negligence, so under authority of *Hollopeter v. Palm*, above cited, as stated at page 564 thereof, Defendant is denied the defenses of contributory negligence and assumption of risk.

THERE WAS NO MEETING OF MINDS ON A SETTLEMENT BETWEEN THE PARTIES HEREIN WITH RESPECT TO PLAINTIFF'S GENERAL DAMAGES FOR THE ACCIDENT OF NOVEMBER 5, 1934.

ARGUMENT

Defendant admits that it had rejected the Workmen's Compensation Law, and was not under it on November 5, 1934; but declares that it carried an insurance which provided benefits for its injured workmen. (Defendant's Brief, page 6.)

The only insurance policy under which it ever paid Plaintiff anything (Defendant's Exhibit 10) for the accident of November 5, 1934, was one numbered 543012. (T. 151, 152 and 153.)

It made another draft (T. 152; D. Ex. 11), but changed the payment to one for the accident of June 11, 1934, after it was originally drawn for the acci-

dent of November 5, 1934. This draft was also under policy numbered 543012.

This policy was never introduced at the trial nor any of its terms in anyway put in evidence or referred to. Its absence was never explained, though the Learned Counsel for Defendant twice gave the insurance man an opportunity to do so at (T. 136) and again at (T. 138), and Plaintiff pointed it out most forcefully at (T. 144 and 145). As far as this case is concerned, it never existed.

Counsel in his brief at page 6 refers to (T. 153, D. Ex. 26), but he must be in error, for Defendant's Exhibit 26 is a policy between the insurance company and the Union Service Stations, Inc. It, also, had expired July 1, 1934, more than three months before the accident of November 5, 1934. (T. 154.)

However, this is the policy numbered U S 519380 under which all the other payments were made to Plaintiff and they for the accident of June 11, 1934. (T. 152 and 153 and Def. Exs. 12, 14, 15, 16, 17, 18 and 19.)

Perhaps Counsel meant Defendant's Exhibit 27, which is a policy in which Defendant is the assured.

Just why this policy was introduced is hard to see because nothing was ever paid under it.

No settlement of Plaintiff's general damages could have been made under either Defendant's Exhibits 26 or 27, because they contain the following clause (T. 158):

> "If such injured employee or his dependents accept the first payment on account of compensation, he or they shall at that time execute a general release relieving this Employer and the Company from all further obligation because of such injury except the obligation for compensation in manner and form as agreed."

What this particular insurance company means by a "general release" is shown by the case cited by Defendant of *Anderson v. Hartford Accident & Indemnity Co.*, 152 Or. 505—53 P. (2d) 710, 54 P. (2d) 1212, at pages 507 and 508. This general release was exacted in this case before anything was paid the workman, just as was provided in the policy with the Union Service Stations, Inc., No. U S 519380, or Defendant's Exhibit 26. Also, after the payments in that case ceased, as the Court states on page 508 thereof:

> "the plaintiff signed a document designated as a release and settlement of claim, in which the

above amounts were itemized and it was recited that in consideration of the payment of said amounts to the plaintiff by the Hudson company, the plaintiff released and discharged the said company 'from any and all actions, causes of action, claims and demands, damages, costs, loss of services, expenses, and compensation on account of and in any way growing out of any and all known and unknown personal injuries . . . resulting or to result from 'the accident.' "

In the case at bar there is no claim by Defendant that any general release was ever executed by Plaintiff, and he repeatedly and categorically denies any such release as at (T. 145 and 146). Defendant's Exhibits 10 and 11 show they were for compensation for lost time only.

For some reason which does not appear, the insurance company in the within case did not consider itself bound to Defendant under any policy, surely not under U S 543012 or U S 543014, but only to the Union Service Stations, Inc. (D. Ex. 26 or U S 519380.)

(T. 133.)

"A. There had been some time elapse from the injury of June the 11th, and there was a little question as to whether or not we would take

> care of those payments, and for that reason Mr. Russell had telephoned me. He said they would like to come over and talk to me about it. They came over, and ——" (Interruption.)"

The insurance company made a mistake and paid one payment for lost time under a policy for which it was not bound (D. Ex. 10) and under policy No. 543012 (T. 151) on account of the accident for which Plaintiff sues or of November 5, 1934, and then corrected it immediately after it had made a draft, also under policy No. 543012, for the accident of November 5, 1934, to read for the accident of June 11, 1934 (D. Ex. 11), and then made all the rest of its payments for time lost on account of the accident of June 11, 1934, for which it was bound to pay, but under policy U S 519380, to the Union Service Stations, Inc., an entirely different person from the defendant (T. 153 and 154 and D. Ex. 12, 14, 15, 16, 17, 18 and 19), conclusively disproving any intent to settle with Plaintiff for his general damages resulting from the accident of November 5, 1934.

Defendant at all times up to and during the trial maintained that Plaintiff's injury of November 5, 1934, was a recurrence of the injury of June 11, 1934, and had so reported it to the insurance company.

(See Defendant's Brief at bottom of page 10, also (T. 133).

> "He stated that he had sprained his back as the result of changing a tire, and I told him we had had a report of an accident in June of the same thing and he said yes, it was a recurrence of the first injury.
>
> Mr. Powers: Q. And did he tell you that any car had fallen on him at any time?
>
> A. No, sir."
>
> (T. 142.)
>
> A. I said Dr. Dillehunt informed us this a recurrence of July the 11th. * * *
>
> "A. Yes. Dr. Dillehunt informed us that it was November 5th injury was a recurrence of the injury of June 11th."

but now upon appeal it states in its brief at page 7:

> "The claims adjuster was already acquainted with plaintiff's prior accident of June 11, 1934, and plaintiff informed the claims adjuster of his second accident of November 5, 1934, telling him that a car had slipped off a jack striking him on the back,"

as it stipulated was the fact (T. 106). This is apparently what the jury believed; and as Witness Ever-

ett L. Keith, absolutely disinterested, says:

(T. 91.)

"Q. Can you state what happened?

A. Yes. He drove in there in his car and asked me if I would go over and change a tire for him, and he said the car had—he had jacked it up and it had fell off onto him and hurt his back and he wanted to know if I would go over there, and he seemed to be in pain there, and his face was white and everything, so I told him sure, I would go over and change the tire, so I went over there and the car was right just as he had left it there, the jack was still laying underneath the car, and I jacked the car up——" (T. 92 to 93.)

"A. Well, he seemed to be hurt all right, he seemed to be in pain. I know he couldn't hardly get out from underneath the wheel to let me drive it over there. I drove the car back over to where the tire was at that he wanted changed.

Q. What was his condition that made you think he was in pain?

A. Why, he was nervous and his face was white. I didn't want to go, either, because it was cold and rainy."

(T. 98.)

"A. When we drove in there they wanted to

know what was the matter and he told him the car had fell off the jack and hurt his back, so they sent him on home then.

Q. What stated that?

A. Mr. Hunt.

Q. In your presence?

A. Yes.

Q. To whom did he state it?

A. Mr. Timmer.

Q. Mr. Timmer?

A. Yes.

Q. And what was Mr. Timmer's position there?

A. Manager."

There seemed to be a feeling upon Defendant's part that the insurance company was not liable to pay for the accident of November 5, 1934, and it caused Mr. Russell to telephone and interview Mr. Hadfield, the adjuster, and attempt to convince him that the injury was a recurrence of the injury of June 11, 1934. (T. 133.) Perhaps that is the reason Mr. Russell kept Plaintiff on full time payment (T. 70, 71, 109, 111, 129 and 67).

By its manager and its surgeon it represented to the insurance company that Plaintiff's injury was a recurrence of the injury of June 11, 1934, while policy 519380 with the Union Service Stations, Inc., was in force. (T. 133 and 142.) To this Plaintiff, it represented (T. 129 and 67) as to this Court upon this appeal it represents (T. 106, line 8; Def.'s Brief, p. 7) that it accepted his statement that the injury sued upon was the result of the accident of November 5, 1934.

With such duplicity in the mind and conduct of the Defendant, how can it now be heard to say that it understood that it was reaching an accord and satisfaction with Plaintiff for all of his damage for the accident of November 5, 1934?

From Defendant's own testimony and exhibits (T. 152, 153 and 154), Hartford Accident & Indemnity Company paid $787.46 for doctors' and hospital bills and time lost on account of the accident of June 11, 1934, under policy No. U S 519380 (D. Ex. 26), in which Union Service Stations, Inc., was the assured and at that time Plaintiff's employer, on account of which policy Defendant was entitled to no credit, to which it was not a party and for which accident it was in no way liable;—yet, behold, it represented to Plaintiff as it now represents to the Court, that with

the trifle of $33.60 paid under the unknown, unproven policy No. 543012 (D. Ex. 10, T. 152), it should be credited in full or at least to have added the $787.46 paid for Union Service Stations, Inc., above, and be credited for $820.80 on account of all of Plaintiff's general damage for suffering, pain, permanent disability and impairment, etc., on account of the accident of four months later or November 5, 1934.

According to Defendant's witness, its own insurance adjuster, Mr. Hadfield (T. 142), this $33.60 (D. Ex. 10, T. 152) also should have been paid under Union Service Stations, Inc., policy U S 519380 as time lost because of the "recurrence of the injury of June 11, 1934." Dr. Dillehunt, the great surgeon, must speak accurately, and Webster's New International Dictionary, 1925 edition, page 1786, shows "recur" to mean: "To occur or appear again, * * * as, the fever will recur tonight." Mr. Hadfield's testimony must be an admission by Defendant that the entrie payment of $820.30 was Plaintiff's own credit due under above policy U S 519380 as justly as if deposited in a bank as his special damages because of the accident he had suffered June 11, 1934.

Permitting the violent assumption for which there

is no evidence, that had policy No. 543012 been introduced and that among its unknown terms it had provided that this paltry $33.60 (D. Ex. 10),—the only sum which from all evidence appears to have been paid on account of the Defendant—should be for a general and complete release from Plaintiff for all his general injuries and damages, resulting from the accident of November 5, 1934 [besides Mr. Hadfield's statement that it was in error and should have been for the recurrence of the injury of June 11, 1934 (T. 142)], such an assumption would stand as a naked example of what is shockingly unconscionable.

Such is the duplicity, the contradictions of its own testimony and admissions and written evidence with which it seeks to prove an accord and satisfaction entered into at a time when neither party knew what the nature and extent of the injuries were to prove to be (T. 133 and 110 to 111); but which injuries developed to be most serious and extensive, including pain (T. 61 to 66) and suffering, including mental anguish (T. 67 to 72), hardship (T. 80), permanent impairment of his body and earning power and continuing and future pain and handicap (T. 80). Against these unbelievable improbabilities stands the strong, consistent repeated testimony of Plaintiff's understanding,

which is uncontroverted and unweakened (T. 113 to 114).

(T. 143.)

"Q. Now, at any time, whether by the singing of the check or in any manner, did you ever agree with any person to waive your right to claim for injuries to yourself your body, your person, on account of the accident of November 5th?

A. No, I didn't."

(T. 143 to 144.)

"Q. I wish to hand you Defendant's Exhibit 27, that is the insurance policy which Mr. Hadfield stated was the second insurance policy and which was introduced last. I will ask you when you first saw that policy.

A. Yesterday was the first time I saw it.

Q. When it was brought in here?

A. When it was brought in here.

Q. Did you ever discuss that policy with anyone?

A. No, sir.

Q. Did you ever agree to accept anything under that policy in consideration of the settlement

of your claims against the Union Oil Company?

A. No, sir."

(T. 145 to 146.)

"Mr. Rauch: Q. When you received those checks marked for the accident of November 5th, 1934, what did you understand you were receiving?

A. I understood I was receiving my time for the accident that happened to me. It was just payment or compensation for time lost.

Q. Lost on account of what?

A. Well, the first injury, and I saw the dates on there and I thought possibly there was a mistake, to the second accident and the aggravation of the first injury.

Q. Did you ever accept any money at any time from this defendant or its insurance company for any other claim than this compensation, for any other claim or for any other reason or thing than for this compensation which you state is for time lost due to the operation, the first accident, aggravation of that, and the second accident?

A. No, sir."

All of the evidence offered, written and parol, was given the jury to determine whether, as a matter of

fact, the payments made to or for Plaintiff were considered and understood by him as made in complete release and discharge of all obligations and liability growing out of the accident of November 5, 1934, or whether he understood he was just being paid for the loss of his time.

Plaintiff's testimony was at all times consistent and positive that he understood that the money he received was solely for time lost (T. 145 to 146), and that no agreement or understanding of accord, satisfaction or release was ever made or entered by him with anyone on account of injuries to his body or person because of the accident of November 5, 1934 (T. 143, 144 and 146.)

There was complete disagreement between Plaintiff and Defendant at all times, including throughout the trial, as to which accident caused the injuries, Plaintiff at all times insisting and telling Defendant that they were caused by a car falling on him November 5, 1934 (T. 67, 125 and 129), and Defendant at all times insisting that Plaintiff informed it that the injury was a recurrence of June 11, 1934 (T. 132 and 133), and that in truth it was such recurrence (T. 142 and 163), and after making one draft for time lost on account of the accident as Plaintiff declared it

happened (D. Ex. 10), changed back to its claim of recurrence (D. Ex. 11) and made all subsequent drafts consistent with its claim; and only now upon this Appeal does it admit that Plaintiff was right all the time (T. 106; Appellant's Brief, pp. 5 and 7.)

There was no evidence that Plaintiff understood that he was receipting for anything more or different when he accepted compensation for lost time after he went to the hospital than he did before, when he was receiving full time pay for complete absence from the office or just to "fuss around" (T. 69, 70, 109 and 111) from the time of the accident of June 11, 1934 (T. 109).

At the time of the interview, neither party knew what the extent and permanence of the injuries would be, as neither knew what a fusion operation was (T. 110, 111 and 133).

That the injuries were grave, extensive, permanent and actual is not in the least disputed, including pain and injury (T. 61 and 66), suffering and confinement (T. 67 to 72), mental anguish and physical suffering at the hospital (T. 73 to 79), the hardship of convalescence (T. 80), and permanent handicap, impairment and pain (T. 81 to 85); nor does Defendant

attempt to justify its shockingly unconscionable claim that for complete satisfaction and compensation for such grave general injuries, Plaintiff understood he was accepting $33.60. Yet that is all that was ever paid, even by mistake for the injuries sued for herein, arising from the accident of November 5, 1934. True, it now claims credit for $787.46 which the insurance company paid for the accident of June 11, 1934, but that was upon policy U S 519380 (T. 154, D. Ex. 26) written for the Union Service Stations, Inc., which at that time was Plaintiff's employer and in which policy and payment, Defendant had no interest.

The written evidence fails wholly to include any general release executed by Plaintiff. All of the payments except one were made under the policy to Union Service Stations, Inc., U. S. 519380 (D. Ex. 26) for an entirely different accident than the one sued upon. The one payment made on account of the accident sued upon on November 5, 1934, was so made by mistake of the insurance company (T. 142).

This one payment so erroneously made was on account of a policy (No. 543012) never proven or explained (T. 151). What were its terms, Defendant at no time gave any evidence or inference, though it was

repeatedly brought to its attention at the trial (T. 136, 138, 144 and 145).

No policy was introduced under the terms of which anything was paid this Plaintiff on account of the accident complained of on November 5, 1934. True, Defendant put in its (Ex. 27) or policy No. 543014, but nothing was ever paid or done under it. This immaterial exhibit and (D. Ex. 26) contain a clause requiring a general release when a first payment is made an employee thereunder. A sample of general release designed by the same insurance company that wrote (D. Exs. 26 and 27) is set forth in *Anderson v. Hartford Accident & Indemnity Company*, cited herein by appellant; yet no general release of any kind was introduced in this case.

Each draft upon which Plaintiff signed a receipt definitely showed in detail the claim for which its endorser receipted, and each specified a distinct and separate period of the time or segment, the claim for the loss of which, such draft was to compensate; and thereby, each negatived any pretense that it was payment or settlement for anything else.

Therefore, from all the evidence in this case, written and parol, the jury was justified in finding that the Appellant failed to show that anything was paid

by it to Plaintiff or was considered by him to have been paid by it as in release or discharge of the obligation Appellant owed Plaintiff because of his general damages and injuries to his person, growing out of the accident of November 5, 1934. Also, the jury was justified in finding from all the evidence that Plaintiff understood that the money which was paid him was for the loss of his time, only. The facts also justified the jury in finding that the money paid Plaintiff was for loss of time, growing out of another accident of June 11, 1934, while he was working for an employer other than Defendant.

All of the evidence being before the jury, it must be presumed in arriving at its verdict to have taken into consideration for what they were worth, immaterial though they may be because paid for another accident of June 11, 1934, all the payments for hospital bills, doctors' bills and time lost. At least no one claims the verdict was excessive.

SPECIFICATION OF ERROR NO. 1

By this Specification, Defendant seeks the protection of the defense of assumption of risk.

Of course, as pointed out herein at pages 33 to 34 hereof, Defendant deprived itself of this defense when

it rejected the Workmen's Compensation Act (T. 8 Par. VII and T. 10 Par. II) 1935 Sup. Ore. Code, Sec. 49-1819, Holopeter v. Palm; 134 Or. 546 see page 564.

This Plaintiff seeks the fullest benefit of this statute against the attempts of Defendant to protect itself by such defense. However, without in the least waiving any portion of such benefit due Plaintiff, our respect for the high authorities quoted lead us to endeavor, by way of courtesy to the elaborate specifications of error in Defendant's Brief, to discuss some of them as concisely as possible.

The law is so well established and so often well stated in this Court and in Oregon that Defendant's conclusion that the Plaintiff assumed the risk must result from a different understanding of the facts from ours.

On pages 14 and 15 Defendant seems to imply that Plaintiff should have taken the heavy station jack with him. No witness of either party suggested that it was ever used on repair jobs away from the station. The Plaintiff said:

(T. 53 to 54)

"Q. On the station lot there was a large, heavy

jack there of the type that rolls on four wheels that you could pull around with a large extension handle on it, and this jack was too heavy, I couldn't have lifted it, taken it out on the call; and if I got—if someone could have put it in I could never have gotten it out of my car. Also this jack, we didn't use it whenever possible because it had a habit of slipping, and when you get the car up you couldn't always get it down. You have to shake and jiggle the handle to get that jack to lower, and so I went on to this job without my own jack."

This station jack was broken and unsafe. Disinterested Witness Ernest H. Coats testified:

(T. 87 and 88)

"Q. Now, that was between the dates of June, 1934, and November, 1934?

A. Yes, as close as I can figure it.

Q. Now I want to ask you if during that period of time you knew whether or not there was a jack at the station?

A. There was, yes.

Q. And can you state whether or not it was this jack?

A. It couldn't have been—it might have been this jack, but there is new parts on it, sir.

Q. Well, what was the difference, if any, with the jack as it was at that time and this one as you see it?

A. May I show you?

Q. Yes, step down and look at it.

A. Well, the jack that was over there at that time, on these little——

Q. Push it out this way so the jury may all see it.

A. There was ends knocked off of about two, if I remember right, of these little rachets right here, the ends of them, and when it come down to those, why you would have quite a jump in that handle when you would come down on those and it would drop down to maybe the third one here, and when it did it would jerk this handle and it would be very unpleasant as to handling it, and for that reason we stayed away from it as much as possible. We didn't use this as much as we could because there was two of these ends knocked off.

Q. Did you ever have any further dealings at Fargo and Union other than this intermittent dealing while you were at Station 425 at 13th and Broadway.

A. Well, I was manager of it during the fall of '35 until it was leased out.

Q. As manager did you have anything to do with that defective jack that you described?

A. Why, yes. At that time Mr. McGrath was assisting Mr. Russell, or whoever the supervisor was then, and when I was made manager of it I immediately—I was a friend of Mr. McGrath's and I immediately called him and asked him to get me a jack that was—that I could use, one that would be safe, so it wasn't very long before he came over with a jack on the side of a running board of a car with the handle of it thrown over the fender, and he dropped that jack off to me. He gave me that jack, and took the one that was there away, and that is the last I have seen of it."

The Plaintiff further testified:

(T. 103)

"A. Well, the jack that was at the station at that time, the teeth and the rachet effect on one end of the teeth was sheared off, and the spring handle, when you would work the spring handle it would stick. I don't know how this one works. The other one wouldn't release properly. You would squeeze that and it wouldn't give. You would have to shake the jack to get it to release.

Q. What was the effect on one using it?

A. Well, when you shook that thing it jarred

you and all at once it let go and this handle would fly up and you would have to hang on to lower it down."

Surely no rule of law compelled Plaintiff to attempt something he was not strong enough to do. Defendant knew his condition, and was apparently keeping him on so as not to report a loss time accident (T. 70) until it could be adjusted as a charge against the insurance of Union Service Stations, Inc., and not increase Defendant's record of accident (T. 142) which it eventually accomplished.

There is no claim that Plaintiff knew his own jack was dangerous or to dispute his following testimony. (T. 42)

"Q. Now, your own jack, was there anything wrong with it especially?

A. No, it had been working right along.

Q. And it was all right for your car, was it?

A. It worked on my car.

Q. What was wrong with it for this car?

A. There apparently wasn't anything, there shouldn't have been anything wrong with it for this car.

Q. Well, was there anything wrong with it for this car?

A. Well, when I used it and got the car jacked up the car slipped off the jack."

Defendant would seem to limit the difference between the weak, old type Ford jack to the "shortness of the jack handle" (Def's. Brief page 16).

Disinterested Everett L. Keith seemed to have a better knowledge of the mechanics involved in the use of the two jacks with the particular type of car involved.

(T. 95, 96 and 97)

"A. They have quite an overhang on the Plymouths. They are built rather low to the ground, and this one had a trunk rack on the back of it.

Q. It had a trunk rack in back?

A. Yes, sir.

Q. Can you state what the structure of the car is as far as distance from the axle to the rear of it is concerned?

A. You mean to state the distance from the axle to the back of the car?

Q. Yes.

A. Oh, approximately four feet.

Q. Approximately four feet. Well now, what did you do when you got there?

A. Well, I took off my raincoat and laid it on

the ground and crawled underneath there and jacked it up again with the same jack.

Q. Will you state why you crawled under it?

A. Because you couldn't walk under it.

Q. Well, why did you go under it?

A. To jack up the car.

Q. To jack the car up. Could you jack it up from outside any way other than to crawl under it?

A. Not with that jack, no. If the jack for the car had been there like it is supposed to be used on that car you could have jacked it up from the outside, but there was no other jack there.

Q. What kind of jacks were supposed to be used on that car?

A. It is supposed to be a screw type jack that you could insert a handle in and push it back underneath there and stand on the outside and wind the car up without crawling underneath it.

Q. Do you know what form of jack was used generally in the community at that time with that type of car?

A. A screw type jack.

Q. Screw type jack. Well now, will you describe to the jury the difference between the

screw type jack and the actual jack which was used to raise that car?

A. The Ford jack that they had there, you had a handle approximately so long that you would push down this handle and every time it would go down you would raise it a notch. With a screw type jack for that car it is supposed to be a screw so that you could push a handle into the jack and slide the jack under the car and stand back from under the car and turn the crank and raise your car up.

Q. Now, can you state which was the higher jack?

A. State which?

Q. Which was the tallest jack, standing on the ground?

A. The Ford jack that he had.

Q. What was the difference in their height, can you show?

A. Oh, a Ford jack is approximately that tall and these little jacks that are supposed to come with the car are only about that tall (indicating).

Q. Do you know whether or not there was any provision on the screw type jack to keep it from slipping from under a car?

A. Yes. On top of the screw type jack there

is four little prongs there that catch the axle to keep it from slipping off.

Q. Was there any such thing as that on the top of the Ford jack?

A. No."

and at (T. 99)

"A. The type of jack that was used on the car there was for a Ford where you could jack up a Ford without getting underneath the car, but with this particular car you should have had a jack with a handle on it about four feet long to raise it without getting under the car."

also (T. 101 to 102)

"Mr. Rauch: Q. Then will you state whether a simple longer handle was required to make a safe tool or an entirely different jack?

(An objection was here interposed; objection overruled.)

A. What I should have had is a telescope jack with a screw type action on it. You should have had an extension handle that extended on beyond the end of the car and that fitted into this jack, and you could have screwed the jack up. You could have stood out at the rear end of the car and turned the jack and raised the car up."

Defendant infers negligence because Plaintiff didn't

prove "the brake was set" (Def's. Brief 16); but the testimony of Witness Keith on that point is:

(T. 93 and 94)

"A. It was parked on the wrong side of the street with the wheels, front wheels, cramped in towards the curb.

Q. Is that street level or does it slope there?

A. No, it slopes to the west.

Q. And which way was the car facing?

A. Towards the west.

Q. And with the front which way?

A. West.

Q. And what part of that car was against the curb, if any?

A. The left front wheel.

Q. The left front wheel. And can you state whether or not the car was in a position that it could move itself?

A. No, it couldn't because the curb stopped it from rolling ahead, and it couldn't roll back uphill.

Q. It was uphill, back?

A. Back, yes.

Q. And the curb was in front of it?

A. Yes."

Defendant (Def's. Brief 17) charges that Plaintiff was "acting of his own accord; no one in the company asked him to", but must we overlook the sales pressure under the quota system that drove these service salesmen?

(T. 50)

"Q. And was there anything to keep you from calling that other station and have someone over there or call some station where they had some extra men if you wanted a man to go down there and get it changed?

A. Well, there were several reasons why we didn't do that. We want the business in our station; this was our customer. At that time there was a quota system on the work that we did, and all service work counted in this system and we naturally wanted the work for ourselves."

and (T. 51)

"Q. Well, the reason you didn't call up anybody else was because of that quota system, you wanted that business yourself?

A. That is right. He was our customer and we wanted to take care of him ourselves. You re-

member he was pretty close to that station and if they had serviced his car we'd have probably lost the customer.

Q. And you would have lost something by that, wouldn't you?

A. We would have lost his business.

Q. Yes, but I mean you had some quota system there you were working on?

A. That is right."

The learned trial judge pointed this out to Defendant at (T. 31).

"Here is a case where station employees were encouraged, under sales pressure, to go off the employer's premises to render services."

Defendant (Def's. Brief 17) would have it believed that an able-bodied assistant could have done nothing but take the blow for Plaintiff, yet it in no way challenges or refutes the following testimony:

(T. 102)

"Mr. Rauch: Q. Now, I want to ask you why it was you didn't take the big jack out?

A. Well, the big jack was too heavy. It required two men to lift that jack.

(An objection was here interposed; objection sustained.)

Mr. Rauch: Q. All right, I will ask this; something was said about an able bodied assistant. State whether or not if you had had one you could have taken the large jack.

A. Yes, I could have.

(An objection was here interposed; objection overruled.)

A. If I had had an assistant he could have lifted the jack in and out of the car."

Defendant (Def's. Brief 22) disagrees sharply with the learned District Court herein concerning the Oregon Supreme Court's relaxing attitude toward the stringent rules in regard to assumption of risk as promulgated in England during the stage coach days of 1837.

With regard to this present day view, the Oregon Court has long since spoken for itself.

In Shields v. W. R. Grace & Co., 179 Pac. 265, 91 Or. 187 at page 204 Chief Justice McBride in an often quoted expression said:

"While, theoretically, a laborer is a free agent, at liberty to examine and guard against danger occurring, or liable to occur, in the course of his employment, and to demand requisite protection, or quit the employment or take the consequences

of remaining, it is common knowledge that such a theory is to a great extent impracticable in the present busy crowded age. His freedom to select his employment is abridged by the constantly increasing numbers who must work or go hungry, and his risks are increased by the immense pressure of a tremendous commerce and the complicated methods of handling it. Under the pressure of competition for employment and the necessity of maintaining his place as a satisfactory laborer, he has little time for observing his surroundings, or taking or even demanding of his employer, those precautions for his safety which a human regard for his welfare ought to be furnished without demand.

These and like considerations have, no doubt, had their influence with the most enlightened and progressive jurists, in declaring much less stringent rules in regard to assumption of risk, than prevailed in the earlier history of jurisprudence where competition in labor was less strenuous and the duty of protecting the laborer was less clearly recognized by the courts."

In Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18 at page 33 in a case where there had been a complaint and promise to repair a shovel Mr. Justice Belt expresses further the Oregon view:

"This court is not unmindful of the fact that

the ordinary laborer who must work in order to eat would, under such circumstances, obey the command of the foreman. The work was not so obviously dangerous as to cause an ordinarily prudent man to refuse to go on with it. Ordinarily, assumption of risk is a question of fact for the jury. To hold, as a matter of law, that plaintiff voluntarily assumed the risk is, in our opinion, giving undue emphasis to the doctrine, although some courts apparently take cognizance of only physical coercion.

The trend of modern decisions is to rebel against the harshness of a doctrine which enables the master to say, in effect, to the servant: 'It is true, as you have complained, that I have been negligent in failing in furnish you with a reasonably safe tool, but you are nevertheless ordered to continue work and, in the event you are injured, there can be no recovery since you understood and appreciated the risk of working with such defective appliance.' "

In the more recent case of Makino v. Spokane, Portland & Seattle Railway Co., 63 P. (2d) 1082, 155 Or. 317 at page 336 Mr. Justice Rossman, quoting in full Chief Justice McBride's statement above, remarks:

"Justice McBride's excellent dissertation on the shortcomings of the rule of assumption of risk as formerly applied was entirely appro-

The following expression by Mr. Chief Justice McBride in the case of *Putnam v. Pacific Monthly Co.*, 68 Or. 36, 130 P. 986, 136 P. 835, escaped the printer through oversight, and we now beg to include it by insertion. This distinguished jurist made the following expression upon a rehearing, and it is found on page 57 of the Oregon report:

> "In the early history of jurisprudence a suit for damages by a servant against his master, while it was tolerated, was always looked upon with disfavor by the courts as a sort of moral petit treason, and every limitation that judicial ingenuity could devise was interposed to make recovery difficult; but in the progress of the years this strictness has greatly relaxed, and the doctrine of the assumption of risk and negligence of fellow-servant has been placed upon a decent and logical basis."

priate in his decision. It was a part of his analysis of the rule and indicated the manner in which the decision had been reached."

The law in Oregon is well settled as stated by Judge Belt in Bevin v. O.-W. R. & N. Co. ante at page 27:

> "It is well settled that an employee assumes the ordinary risks incident to his employment and also those extraordinary risks arising through the negligence of the employer if he understands and appreciates them."

Judge Bean in Christie v. Great Northern Railway Co., 20 P. (2d) 377, 142 Or. 321 page 331 repeats the same words as the rule in Oregon and cites Bevin v. O.-W. R. & N. Co. ante for authority. The same words are again quoted verbatim by Judge Rossman in Makino v. S., P. & S. Ry Co., 155 Or. 317 ante at page 329.

Defendant cites Northwestern Pac. R. Co. v. Fiedler, 52 F. (2d) 400, and the learned District Judge followed the rule so clearly stated by the Hon. William H. Sawtelle of this Circuit at page 403:

> "As to assumption of risk, the Supreme Court has laid down the following rule: 'The burden of proof of the assumption of risk was upon defendant, and unless the evidence tending to show

> it was clear and from unimpeached witnesses, and free from contradiction, the trial court could not be charged with error in refusing to take the question from the jury.' "

It also cites Freeman v. Wentworth & Irwin, Inc. 7 P. (2d) 796, 139 Or. 1 with great satisfaction in its conclusions and rules, but a glance at the facts shows how widely they differ from the case at bar; the court states at page 9:

> "It seems evident that it was not the absence of light, but the plaintiff's failure to properly clean the end of the shaft which caused the accident.",

and at pages 9 and 10:

> "The plaintiff swore that during his six years' employment by the defendant it had never furnished him with a hammer made of copper although, according to his testimony, he had asked it to do so." * * * * "but we didn't have any copper or brass over there, so in order to safeguard on that sort of bludgeon work, as we call it, we usually got a piece of oak, hard wood." He testified that the body-building department of the defendant's plant supplied him with pieces of hard wood upon request, but he did not account for his failure to use a piece of hard wood at the time of the accident."

at page 11:

> "We know of no reason whatever why a short steel bar could not have been tapped into position by the use of a piece of oak; especially, do we know of no reason why this could not have been done by a workman who customarily used that method."

And the decision followed the rule of Bevin v. O.-W. R & N. Co., quoted above, and concluded at page 13:

> "It is apparent that the plaintiff had full knowledge of and appreciated the danger to himself."

The remaining cases which Defendant has cited under this heading involve only the "ordinary risks incident to his employment" of each plaintiff respectively:

Parker v. Norton, 143 Or. 165, (21 P. (2d) 790)

A longshoreman's hook held in the hand to aid one to pile boxes of tin on a dock.

Wike v. O.-W. R. & No. Co., 83 Or. 678 (163 P. 825)

A wire to wrap around an engine boiler by hand in a railroad repair shop.

Walker v. Ginsburg, 244 Mich., 568; (222 N. W. 192)

A wrecking bar held in the hands to pry off boards in the process of wrecking a mill.

Thompson v. Pennsylvania Railroad Company, 88 F. (2d) 148

A steel bar held in the hands as a lever inserted into a bearing hole of a locomotive drive rod, to turn it in an engine repair shop.

In the within case you have an "extraordinary risk arising through the negligence of the employer" which Plaintiff, the employee, by uncontroverted testimony and all logical deduction, did not "understand or appreciate."

Defendant operated a service and sales station which included repairing automobile tires within and without its station. In the regular scope and policy of its business it required Plaintiff to (T. 41): "maybe four tires a week, to go out to service on a customer's yard or out on the street in front of the station or down the street from the station, whenever the call happened to come in," under a sales pressure or "quota system" under which Plaintiff's standing with Defendant and his compensation were measured (T. 50, 51 & 113). A call came (T. 41 Narrative State-

ment) to change a flat tire some distance from the station where Plaintiff worked while he was alone, and it was his duty to himself and his station (T. 51) to respond.

At the service station was a heavy four wheeled jack that was pulled around with a large extension handle, but it was broken and unsafe to use (T. 54) as Witness Ernest H. Coats states (T. 87 and 88) and Plaintiff said (T. 102), was too heavy to lift in and out of the car (T. 103), had teeth sheared off the ratchet mechanism that would cause its load to drop past several teeth with a jar that jerked the handle up and was avoided by the men because its use was unpleasant and dangerous (T. 88 and 54). Obviously it was strictly a station jack, not intended for outside use and there was no evidence that it ever was so used.

The customer had a 1930 Plymouth sedan (T. 54 and 56). He was drunk (T.42) and no help to plaintiff (T. 43), and his jack for the car was broken. Defendant furnished no jack for such outside-the-station work (T. 48 and 53). Plaintiff had to use his own frail Ford jack which was regular equipment that came in a Model "A" Ford, practically a Model "T" Ford jack (T. 54, 42 and 46). Plaintiff met a new and extraordinary situation, under cross-examination he said:

(T. 47)

"Q. So you met a new situation when you got down where the car was that you didn't anticipate back at the station?

A. That is right."

The Plymouth sedans of 1930 were built with their rear quite low with a trunk rack and trunk (T. 54), the axle about ten inches above the ground when the tire was deflated, and allowed between six and eight inches at its rear for Plaintiff to crawl under.

The situation was not ordinary, and Plaintiff's problem became complicated and the Ford jack under the circumstances a very complicated instrument. It was designed to lift the comparatively light Ford Model "A" cars. It is common knoweldge that they were of high clearance, short wheel base, tops largely of cloth and doors of tin with small high pressure tires, and fenders high above the ground leaving the wheels, axles and spring easily reached so that a jack could be easily placed to raise such a Ford and operated in changing a tire easily from the side with the operation free from danger. (T. 100)

The Plymouth sedans of 1930, it is also common knoweldge, were much longer, lower and heavier, their bodies largely of steel and with fenders low to

the ground and covering the wheels and large low pressure tires. You couldn't reach around the wheel to jack such a car up with the Ford jack; Plaintiff testified:

(T. 104)

"Q. Anyone would have had to crawl under it, is that correct?

A. That is right, they'd have had to crawl under it."

The jacks furnished by the manufacturers of these types of cars were as different as the cars. The Ford jack was a frail instrument, with a flat top or platform (T. 45 and 56), not "a prong tip jack to clamp around that axle and hold it on" (T. 45), also Witness Keith at (T. 97) with a short handle and of the ratchet type that went up a notch at a time (T. 45, 54 and 56), and to use on a Plymouth 1930 car, required the operator to crawl under the car (T. 104).

The jack provided for the Plymouth 1930 was a screw type, working like a telescope, one section after another rising until the desired height was reached. The screws forming the telescope were driven by another screw or worm into which an extension handle fitted by which the jack could be slid under the car, and then the worm turned or cranked raising the car

while the operator stood back from under the car and cranked or twisted the handle. Upon the screw type, instead of the flat, smooth top or platform, were prongs that fit or clamped around the axle to hold it on and prevent the car from slipping off the jack (T. 55, 56, 102, 96 and 97).

Plaintiff had no knowledge that the Ford jack was dangerous or unfitted.

(T. 99)

"A. The little jack I used was not all right. As far as I knew it was all right, I had been using it on other cars and it worked right along, yes.

Q. It worked all right for cars of the age and vintage that it was made?

A. Yes, it was."

also (T. 48). He was merely a service boy, twenty years old, who previously had been a newsboy, painter's and baker's helper, his own car was the Model "A" Ford, with which the jack he used came as equipment and with which car he used it (T. 99 and 100). There is nothing to show that he had any knowledge or training with which to meet emergencies out away from the station. He looked on life from the standpoint of a "flivver" driver, and he met his emergencies with

a "flivver" equipment, and says he knew no better, and there is no contradiction of his word (T. 42, 44, 48 and 49). He never knew to the day of trial how or why the car fell (T. 44 and 59).

Defendant at (Page 30 of its Brief) would blame Plaintiff for not blocking the wheels, yet at (T. 93 and 94) Witness Keith states how the car was completely blocked by the curb from moving forward and by the up grade of the hill from moving backward. There is no proof that the brakes were not set. Nothing else is suggested by Defendant or apparent to have made the operation safe except for Defendant to have furnished its employee with an instrument which would have made it unnecessary for Plaintiff to crawl under the car.

It may have been that the resilience of the tires caused a sway or vibration while the Ford jack with the flat top was being applied so that its contact with car was unstable. Plaintiff says (T. 44, 58 and 59) that when he raised himself or elevated his hips to get out, that the car fell. He may have so moved the car, already unstable, on the Ford jack enough to make it fall. Whatever the cause, no man of ordinary knowledge knows now, much less could have "under-

stood or appreciated" the risk which was extraordinary.

It was an engineering problem. The expert engineers of the makers of the new type cars, with the benefit of the experience of the entire public available to them, knew the danger. They designed and provided a jack with a prong or clamp top that would not slip, and so built and equipped that the user need not get under the car. The engineers, managers and other officials of Defendant who designed and developed fuel and lubricants for these new cars knew or should have known the danger.

There is no denial that it was the custom and duty of Defendant to furnish the necessary tools for its employees (D. Ex. 2, 3, 4 and 5 and Supplemental Transcript 1). The screw type jacks were "general", "quite common" (T. 55), "used generally in the community" (T. 96). "They came with cars that had the trunks, the longer rear ends" * * * "you could have bought those jacks on the market. They were for sale" (T. 46). They were not the latest, most expensive equipment. As Defendant expresses it, there must have been millions in use. Yet it furnished only one jack, too heavy and clumsy to use except about the station, and it in bad repair and dangerous, and no portable jack at all to take out on service jobs outside

the station where it sent its employees to service its customers under the sales pressure of its quota system. And now they argue that it was an ordinary risk for Plaintiff to use his immature, untrained judgment in selecting, furnishing and using a device which became most complicated and passed far beyond his physical power to control as its operation multiplied the strength of his body and set into action forces of which he had no understanding; and which device was further complicated and complexed by its application to a modern automobile creating and setting up risks which he wholly failed to appreciate because he was entirely ignorant of such risks and dangers, especially since he had exposed himself to them before with the good fortune not to have them result in disaster to him.

DEFENDANT'S POINT ENTITLED—EMPLOYEE CREATING OWN WORKING CONDITIONS

(Def. Brief, page 30.)

Plaintiff had no chance to create any conditions, least of all "his own". Under the sales pressure of the quota system, he had to service the Defendant's customer where and when that customer ordered. Why time is taken for this statement is hard to see. Defend-

ant argues that Plaintiff undertook the work (a) unknown to Defendant, (b) should have moved car to some other place, (c) should have blocked the wheels. Record (T. 41) shows call came in regular way (a) known and under sales pressure policy (b) from customer who wanted tire changed because he was drunk (T. 42) at his residence, who, had he wanted his tube chewed up by moving the car with the tire flat, would not have ordered Defendant to come and change it. What service moving it would have been! (c) That the car was most effectively blocked is shown by Witness Keith at (T. 93 and 94).

Defendant's authorities do not apply.

> Phillips v. Keltner's Adm'r., 124 S. W. (2d) 71, 276 Ky. 254.

Plaintiff dug trap for himself and sat in it while rock pile slid down upon him after he had been repeatedly warned. Simple tools, shovel and wheelbarrow, were furnished by employer.

In our present case, as already shown, Defendant furnished no simple tool but wholly neglected to furnish any tool and forced Plaintiff to select one which under the circumstances and combinations of fact became most highly and dangerously complicated, thus eliminating any simple tool question.

City of Timpson v. Powers, 119 S. W. (2d) 145 Tex.

Court held the plaintiff there not engaged in repair work and as farm laborer placing poles, it was a question for jury to determine whether he assumed risk of electric shock.

Dinuhn v. Western N. Y. Water Co., 297 N. Y. S. 376; 252 App. Div. 51.

Here the Plaintiff was engaged in a repair of the Defendant's building and was injured by slippery floor caused by mud tracked in by workmen while new stairs were placed with the Plaintiff's help.

Even had Plaintiff created his own working conditions, the defense of assumption of risk was denied Defendant as previously pointed out because it had rejected the Workmen's Compensation Act.

HIS OWN TOOLS

(Def's. Brief page 31)

Besides being denied this defense for having rejected the Compensation Law, the facts of the present case do not admit of such a defense nor in any way

coincide with the authorities cited. Defendant's duty was to furnish all tools for its employees, and it did except a portable jack. It furnished a heavy, defective and dangerous jack for about-the-station use. It left Plaintiff to meet emergencies and extraordinary risks away from the station with his own frail, inadequate device which his immature ignorance led him to use where so unfitted as to create a situation of extreme hazard to him.

The employers in the first two cases Defendant cites under this heading, contracted with the workmen to bring their own tools onto the job, and it was their duty to furnish them. In the third case cited the employer furnished safe and sufficient ladders, but one fellow servant discarded his employer's ladder and supplied a dangerous one to the plaintiff. In all three of these cases, the negligence of a fellow servant was present.

COMPARATIVE KNOWLEDGE

(Def's. Brief page 33)

This is stating a phase of the assumption of risk

defense which of course is denied Defendant for rejecting the Compensation Law.

The cases cited under this head come under that portion of the rule in Oregon referred to so often herein, and as stated by Judge Belt in *Bevin v. O.-W. R. & N. Co.*, 136 Or. 1, at 26: "An employee assumes the ordinary risks incident to his employment." The risks and danger to Plaintiff resulting to his injury in this case were "extraordinary risks arising through the negligence of the employer" of which Plaintiff was wholly ignorant and could not "understand and appreciate".

WORK BEYOND HIS PHYSICAL CAPACITIES

(Def's. Brief page 36)

Plaintiff testified (T. 104) that his back had nothing to do with the obvious necessity of crawling under the Plymouth to raise it with the Ford jack. Anyone would have had to crawl under it. Likewise, testified Witness Keith (T. 95). So under the facts in this case, the argument under this head would have no bearing in this case, even had Defendant not deprived itself of such defense by rejection of the statute.

SPECIFICATION OF ERROR NO. II

(Def's. Brief page 38)

This specification would greatly concern the Ford jack as a simple tool if it were not in fact so complicated. It was composed of many parts, some of them very small and concealed. The very length of its handle, the construction, form and surface of its platform, the mechanism of its lifting power that made it go up a notch at a time (T. 56) or how "every time it would go down you would raise it a notch", were all shown to be complications. The service boys who used it showed by their testimony how much beyond their knowledge its mysteries were except that "It worked on the ratchet type" (T. 54). Some of its ratchets or other parts might easily have been worn or broken, and for all they or anyone knew slipped or let go and caused the car to fall.

When applied to the cars that came out in 1929 and 1930, which these boys had to serve, the Ford jack's complex structure and complication grow in comprehension. What strains and resistance were set up in such cars and their parts, such as tires and

springs when such jack was applied? Just why these new types of cars required jacks of the positive screw mechanism instead of the less certain and less smoothly operating ratchet movement, prongs on top to clamp around their axles and construction to keep people from under them, presented problems and suggested risks Plaintiff and the other service boys did not understand or appreciate. They could not be expected to do so, but it surely was the business of Defendant through its engineers, technical men and managers to know. It was in the business of manufacturing, selling and servicing for these cars, fuels, lubricants, tires and supplies. These types of cars had been out four or five years. Defendant should have known.

Defendant encouraged its service boys to go out and meet emergencies of service like the one resulting in the accident of this case.

The manufacturers of these cars knew these questions, and had answeared them with the screw type jack.

What little care would Defendant have needed to exercise to have provided its service boys with this screw device to meet these extraordinary risks of outside emergency service?

We submit that the Learned Trial Judge did not err in leaving to the jury the question to determine from the preponderance of the evidence whether Defendant provided reasonably safe and adequate tools to meet and prevent what the Oregon rule describes as "those extraordinary risks arising through the negligence of the employer" which the employee does not "understand and appreciate".

We also submit that under the circumstances of this case the Ford jack was not a simple tool when compared with the chain, chisels and wedge of the cases cited by Defendant under this Specification.

Quanah A. & P. Ry. Co. v. Gray, 63 F. (2d) 410 (C. C. A.) Tex., holds at page 413: "there is no reasonable basis for the statement of a 'simple tool doctrine' as a doctrine or rule of law", in a case of a hammer, the wooden handle of which broke.

New York, N. H. & H. R. Co. v. Vizvari, 210 F. 118 (C. C. A.) N. Y., holds at page 121: "We do not think that a steel chisel used for cutting steel rails is a 'simple' tool within the meaning of the rule."

Nugent Sand Co. v. Howard, 11 S. W. (2d) 985 Ky., holds at page 986 that a ladder, "chicken ladder", was not a simple tool.

SPECIFICATIONS OF ERRORS, III, IV, V AND VI

(Def's. Brief page 46 et seq.)

What Defendant states to be the facts under the above numbered specifications are so utterly different from the facts in this case as shown by its own exhibits and testimony and all the undisputed evidence that Plaintiff will take no further time of this Court discussing them, but respectfully refers the Court to Plaintiff's Further Statement of the Case, Summary (b), (c), (d) and (e), and Argument under the head: There Was No Meeting of Minds, etc. Also, by way of professional interest we refer the Honorable Court herein to *John J. Craig Co. v. C. E. Chambers,* 13 Tenn. App. 570, decided March 28, 1931.

Wherefore, Plaintiff submits that the Judgment upon the Verdict herein should not be disturbed.

Respectfully submitted,

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